Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

CHRISTINE VAUGHN and MARION GEE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

JACK GREENBERG
O. PETER SHERWOOD*
CLYDE E. MURPHY
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

JOHN WALKER
1191 First National Bldg.
Little Rock, Arkansas 72201

ZIMMERY CRUTCHER, JR.
MAYS, CRUTCHER & BROWN
One Union National Plaza
Suite 836
Little Rock, Arkansas 72201

Attorneys for Respondents

* Counsel of Record

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
Summary of Argument	3
Argument: Reasons for Denying the Writ ..	4
I. The Petition for Certiorari Distorts the Record and Misconstrues the Holdings of the Court Below	
II. The Eighth Circuit's Holding that the Defendant Failed to Fulfill its Evidentiary Burden of Articulating a Legitimate Nondiscriminatory Reason for Plaintiff's Disqualification, and, its Alternative Holding that Even if Such Reasons Were Found to Have Been Articulated the Record Supported a Finding that the Reasons Were a Pretext for Discrimination, are Consistent with the Decisions of this Court	10
III. The Holdings of the Eighth Circuit are Consistent with the Decisions of Other Circuits	17
Conclusion	23

TABLE OF AUTHORITIES

Page

Cases:

Board of Trustees v. Sweeney, 439 U.S. 24 (1978) 2,14,15,17

Brown v. Gaston Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972) cert. denied, 409 U.S 862 (1972) 8,14

Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563 (5th Cir. 1979) cert. granted 48 U.S.L.W. 3820 (U.S. Sup. Ct. June 17, 1980 (No. 79-1764)..... 18

Coleman v. Missouri Pac. R. Co., 622 F.2d 408 (8th Cir. 1980) 19,21

Furnco Construction Corp. v. Waters, 438 U.S 567 (1978) 2,10,11,12, 13,15,17,21

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 6,7

James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979) 18,21

Kentroti v. Frontier Airlines, Inc., 585 F.2d 967 (10th Cir. 1978) 18,20

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 18,19

Page

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 2,10,17,21

Middleton v. Remington Arms Co., Inc., 594 F.2d 1210 (8th Cir. 1979) 10

Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978) 18,20

Silberhourn v. General Iron Works Co., 584 F.2d 970 (10th Cir. 1978) 17,18

Taylor v. Philips Industries, Inc., 593 F.2d 783 (7th Cir. 1979) 18,20

Turner v. Texas Instruments, Inc., 555 F.2d 1251, (5th Cir. 1977) 18

Vaughn v. Westinghouse Electric Corp., 471 F. Supp. 281 (E.D. Ark. 1979) ..... passim

Vaughn v. Westinghouse Electric Corp., 620 F.2d 655 (8th Cir. 1980) ..... passim

Whack v. Peabody & Wind Engineering Co., 595 F.2d 190 (3rd Cir. 1979) 18,21

Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980) 18,21

Statutes:

42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended 1,5

No. 80-276

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

==========

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

CHRISTINE VAUGHN and MARION GEE,

Respondent.

==========

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

==========

BRIEF IN OPPOSITION

==========

STATEMENT OF THE CASE

This case presents questions concerning the proper allocation of the burden of producing evidence in a lawsuit brought pursuant to Title VII

of the Civil Rights Act of 1964, and whether the District Court's opinion in this case may be held to be clearly erroneous. The Eighth Circuit held that the District Court's opinion was consistent with the decisions of this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Reviewing the record and the District Court's reasoning, the Court of Appeals held that the lower court correctly concluded that the defendant, Westinghouse Corporation, failed to meet its burden of articulating a legitimate nondiscriminatory reason for the disqualification of the plaintiff. Moreover, the Court of Appeals noted that even if the District Court had found the reasons articulated by Westinghouse to be legitimate and nondiscriminatory, there was sufficient evidence in the record to find those reasons to be a pretext for discrimination.

The Eighth Circuit denied the defendant's petition for rehearing en banc or by the panel, and the defendant subsequently filed its petition For Writ Of Certiorari.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for three reasons: (1) The petitioner has distorted the record and misconstrued the holdings of the Courts below in a manner which obscures the issues and the findings in this case; (2) The Eighth Circuit's holding that in seeking to rebut the employee's prima facie case by articulating a legitimate nondiscriminatory reason, the employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually; as well as its alternative holding that even if such reasons were found to have been articulated, the record supported a finding that the reasons were a pretext for discrimination, are consistent with the decisions of this Court; (3) The holdings of the Eighth Circuit are fully consistent with the decisions of the other Circuits.

ARGUMENT

Reasons For Denying The Writ

I. THE PETITION FOR CERTIORARI DISTORES THE RECORD AND MISCONSTRUES THE HOLDINGS OF THE COURT BELOW.

Ignoring the full and accurate statement of the facts by the two courts below, see 620 F.2d at 656-657 (Pet. App. B at 2-6);[1/] 471 F. Supp. at 283-290 (Pet. App. A at 2-31), the petitioner now seriously distorts the record and has misconstrued the holdings of those Courts in its quest for new factual findings in this Court. This effort fails to recognize that this Court simply does not sit to resolve disputed issues of fact.

First, following a trial to the Court of five days, the District Court[2/] carefully considered the evidence before it and concluded that ". . .

1/ Citations in this form refer to the appendix to the petition.

2/ The Honorable Richard S. Arnold, United States District Court Judge for the Eastern District of Arkansas, assumed the office of Judge of the United States Court of Appeals for the Eighth Circuit on March 7, 1980.

the proof is more than sufficient to establish a prima facie case". 471 F. Supp. at 284 (Pet. Ap. A at 5). In support of this conclusion the Court noted a wealth of evidence, including the highly credible testimony of Ms. Wilma Donley, id. at 285 (Pet. App. at 9-12); a careful consideration of the testimony of plaintiff Vaughn and the defendant's witnesses, id. at 289-290 (Pet. App. A at); a review of the exhibits, id. at 289; and a visit to the Westinghouse plant by the Court, id. at 287; as well as a highly persuasive statistical case pointing to the discriminatory practices of the defendant, and concluded that the defendant had:

> . . . simply failed to persuade this Court that its proof is sufficient to overcome plaintff's prima facie case with respect to Ms. Vaughn's disqualification.

471 F. Supp. at 290 (Pet. App. A at 30).

For example, the evidence demonstrated that the defendant had a history of discrimination going back to the effective date of Title VII.[3/]

3/ July 2, 1965.

The Court found that at that time, " . . . almost no blacks were employed by the defendant Westinghouse". Id. at 284 (Pet. App. A at 5). Similarly, noting that the situation had changed rather slowly, the Court went on to find that presently only 3 of 22 office and clerical employees were black; no blacks had ever been employed as supervisors in the defendant's office force; only 2 of 25 or 26 supervisors who held entry-level management jobs were black; and that while the defendant's overall work-force was roughly representative of the proportion of blacks and whites in the relevant population, blacks were almost exclusively concentrated in production jobs, "which are lower paying". Id. at 284 (Pet. A at 6).

Similarly telling was the Court's finding that given the high number of blacks applying for jobs at Westinghouse; the disproportionately low numbers of blacks obtaining positions; and the inability of the defendant's personnel manager to explain these figures; "[T]he inference is very strong indeed that the number of black people hired is being artificially depressed". Id. at 284 (Pet. App. A at 7). Accord, International

Brotherhood of Teamsters v. United States, 431 U.S. 324, 339, n.20 (1977).

The Court's opinion goes on to cite additional statistical evidence supportive of plaintiff's particular claim, including the fact that of 65 persons discharged between 1972 and 1978, 39 or 60% were black, "a figure far above the overall proportion of black employees, which now is at a high of about 24 or 25%."[4/] Id. at 285 (Pet. A at 9).

In the context of this type of statistical data the Court succinctly expressed its view with respect to the fact that no specific qualifications had been set out by the employer for either production-line jobs or supervisory jobs.

> Subjective criteria for employment are not illegal in themselves but the fact that an employer has continued to use them, with the danger of disparate treatment that they entail, is a factor to be considered.

4/ See 471 F. Supp. at 284-185 (Pet. App. A at 7-9) for additional discussion of the racial stratification of the defendant's workforce.

471 F. Supp. at 285 (Pet. App. A at 9).[5/]

The defendant's petition relies on the notion that the Court[s] below required the defendant to establish "objective standards" for disqualification of employees as a prerequisite to meeting its burden of "articulating a nondiscriminatory reason" for the disqualification of the plaintiff. However, neither of the Courts below imposed such a requirement. In fact the District Court specifically rejected such a course, see 471 F. Supp. at 291. (Pet. App. A at 33), and the Court of Appeals made no mention of such a standard. Rather, both Courts found that in light of the statistical and documentary evidence, and the conflicting nature of testimony offered at trial, the defendants disputed statements regarding plaintiff's poor production did not suffice to overcome plaintiff's strong prima facie case.

5/ Compare Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972) cert. denied 409 U.S. 862 (1972) "... [t]he lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's workforce."

This view is well-stated by the Eighth Circuit at 620 F.2d at 660 (Pet. App. B at 16):

> [w]e interpret the district court's decision, as clarified by its May 23, 1979, order, to state that although reasons were articulated, i.e., poor production, given the opposing evidence concerning production and the absence of objective production criteria, Westinghouse failed to demonstrate the letitimacy of its articulated reason by a preponderance . . . 'Affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.' International Brotherhood of Teamsters v. United States, 431 U.S 324, 343 n.24 (1977) (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (9172). (emphasis added)

Thus, the petition distorts the record by failing to adequately inform the Court of the basis for the lower Court's holding and further misconstrues that holding by erroneously asserting the addition of categorical burdens which the Court did not impose.

II. IN HOLDING THAT THE DEFENDANT FAILED TO FULFILL ITS EVIDENTIARY BURDEN OF ARTICULATING A LEGITIMATE NON-DISCRIMINATORY REASON FOR PLAINTIFF'S DISQUALIFICATION, AND, THAT EVEN IF SUCH REASONS HAD BEEN ARTICULATED THE RECORD SUPPORTED A FINDING THAT THE REASONS WERE A PRETEXT FOR DISCRIMINATION, THE DECISION OF THE EIGHTH CIRCUIT IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Eighth Circuit held that in seeking to rebut the employee's prima facie case by articulating a legitimate nondiscriminatory reason, "[T]he employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually." 620 F.2d at 649 (Pet. App. B at 13). The Court therefore addressed itself to the specific evidentiary showing necessary in order to comply with this Court's prescription that the employer "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), this Court addressed the issue of the nature of evidence necessary to rebut a prima facie case. There can be no dispute that

the decision in Furnco, expressed the view that the articulation of a legitimate nondiscriminatory reason was synonymous with offering proof as to that reason.

> When the prima facie case is understood in the light of the opinion in McDonnell Douglas, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not on an illegitimate one such as race.

Furnco Construction Corp. v. Waters, supra, 438 U.S. at 577.

The essential flaw in the defendant's petition is its contention that the mere assertion of a proposed reason is, in every case, sufficient to rebut the prima facie case. Nothing in Furnco supports such a view. Indeed there are few if any similarities between Furnco and the case at bar. For example, petitioner asserts that since the Court in Furnco, refused to invalidate the superintendent's evaluation for selection of bricklayers, that the supervisor's disputed evaluation, should have been sufficient in Vaughn to rebut the plaintiff's prima facie

case. This view wholly ignores, however, the fact that in Furnco, there was substantial statistical evidence that the employer's work force was racially balanced and that therefore there was little if any adverse impact as a result of the employer's practices.

> Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated.

Furnco Construction Corp. v. Waters, supra, 438 U.S. at 580.

In Vaughn, however, the statistics pointed to exactly the opposite conclusion. Here, the "probative value" of such statistics was supportive of plaintiff's contention that the employer's decisions were the result of racial animus.

It follows, that while in Furnco, faced with statistical data indicating a racially balanced work force, the Court refused to invalidate the employer's subjective hiring criteria; Vaughn,

offers the contrary situation in which subjective criterial are coupled with gross evidence of disparate treatment.[6/] Vaughn v. Westinghouse Electric Corp., supra, 471 F. supp. at 825 (Pet. App. A at 9).

In Furnco, this Court rejected the Court of Appeals criticism of the employer's effort to use statistics in this type of case, "once a McDonnell Douglas prima facie showing had been made out." Id. at 579. In holding that such proof is probative in rebutting the prima facie case, the Court impliedly asserts the necessity of putting forth some evidence in support of the legitimate reason asserted by the employer.

Contrary to the assertions of the defendant, the Eighth Circuit in Vaughn has made no effort to "add requirements to the established tests set out by this Court." Pet. at 12.

Rather, the Court below merely confirmed that in the face of the statistical, testimonial and

---

6/ Moreover as stated supra, the Court below did not invalidate the defendants practices, but merely held that the evidence presented by the defendant was insufficient to rebut plaintiff's prima facie case. 620 F.2d at 659-660 (Pet. App. B at 15-16).

documentary evidence on the record, the District Court was correct in holding that the disputed testimony of the defendant's witnesses was not sufficient to rebut plaintiff's prima facie case. The primary significance of the lack of objective standards in Vaughn, was that given the wealth of evidence-statistical, testimonial and documentary-supporting plaintiff's case, the lack of objective standards was an additional factor serving to corroborate rather than rebut plaintiff's prima facie case[7/] which made the defendant's attempts at rebuttal less credible.

Further support of the Eighth Circuit opinion is found in Board of Trustees v. Sweeney, 439 U.S. 24 (1978). There both the majority and dissenting opinions were in agreement as to the employer's burden to "produce[s] evidence of legitimate non-discriminatory reasons" for his action. Id. at 26.

> In litigation the only way a defendant can 'articulate' the reason for his action is by adducing evidence that explains what he had done.

7/ See Brown v. Gaston County Dyeing Machine Co., supra, 457 F.2d at 1383.

Board of Trustees v. Sweeney, supra, 439 U.S. at 28 (Stewart, J. dissenting).

The majority's concern in Sweeney was that, rather than requiring proof as to the legitimate nondisriminatory reasons for the employer's actions, the Court there may have required the defendant to "prove absence of discriminatory motive." Id. at 24. In Vaughn, no such requirement was made of the defendant.[8/] It follows from Sweeney and Furnco that the issue is whether there has been a "credible" articulation of a legitimate reason for the employer's actions. However, if as in Vaughn, the evidence in support of this reason is not credible, then the District Court has the power to reject it and hold that the defendant has failed to meet his burden of articulating a legitimate nondiscriminatory reason.

Significantly, in Vaughn, the Eighth Circuit notes that there was sifficient evidence on the record to hold that even if the defendant had

---

8/ Vaughn v. Westinghouse Electric Corp., supra, 620 F.2d at 658-660.

been found to have articulated a legitimate nondiscriminatory reason, the evidence adduced at trial was sufficient to establish those reasons as pretextual.

> It should be noted that, if required, much of the evidence used by the district court in finding a prima facie case might go to whether the employer's articulated reason is pretextual. McDonnell Douglas states the statistical evidence submitted by plaintiffs is helpful in showing pretext. So would testimony of Vaughn and others relating to individual instances of discrimination. Thus the district court in the present case alternatively could have found the reasons articulated by Westinghouse to be legitimate and nondiscriminatory, but based on the statistical evidence, testimony, and lack of objective production standards, the reasons to be a pretext for discrimination. As noted by the Third Circuit,
>
> > [T]here are no hard and fast rules as to what evidence must be considered as constituting a prima facie case and what evidece is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the factfinder that there has been illegal discrimination resides always with the plaintiff. We will thus review the judgment of the district court not with an eye to strict adherence to form, but in order to determine whether the

> decision on the merits of plaintiff's case is clearly erroneous on the facts, or uncongenial to previously enunciated legal standards. Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3d Cir. 1979) (footnotes omitted).

Vaughn v. Westinghouse Electric Corp., supra, 620 F.2d at 660 n.4.

In Vaughn, the Court below merely applied the standard articulated by this Court in McDonnell Douglas v. Green, supra; Furnco Construction Corp. v. Waters, supra, and Board of Trustees v. Sweeney, supra, and determined that the defendant failed to offer sufficient evidence that the stated legitimate reason for its action existed factually. See Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255-56 (5th Cir. 1977); Silberhorn v. General Iron Works Co., 584 F.2d 970 (10th Cir. 1978).

III. THE HOLDING OF THE EIGHTH CIRCUT IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

The Court in Vaughn did not require that the defendant establish objective criteria; nor did the Court hold that absent such objective criteria

that the defendant could never, under any circumstances, rebut a prima facie case based on disqualification. Rather the Court simply held that on the basis of this record, given the strength of plaintiff's prima facie case, supported by statistical, testimonial and documentary proof, the absence of such objective criteria was a "factor to be considered" Vaughn v. Westinghouse Elec. Corp., supra, 471 F. Supp. 285.

It follows that the decision of the Court below is fully consonant with each of the assertedly conflicting decisions cited by the petitioner. See Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980); Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563 (5th Cir. 1979) cert. granted; Siberhorn v. General Iron Works Co., 584 F.2d 970 (10th Cir. 1978); Kentroti v. Frontier Airlines, Inc., 585 F.2d 967 (10th Cir. 1978); James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979); Patterson v. American Tobacco Co., 586 F.2d 300 (4th Cir. 1978); Taylor v. Philips Industries, Inc., 593 F.2d 783 (7th Cir. 1979); Whack v. Peabody & Wind

Engineering Co., 595 F.2d 190 (3rd Cir. 1979); Coleman v. Missouri Pac. R. Co., 622 F.2d 408 (8th Cir. 1980); Middleton v. Remington Arms Co., Inc., 594 F.2d 1210 (8th Cir. 1979).

For example, there is nothing in Loeb v. Textron, Inc., supra, which contradicts the Eighth Circuit's holding that:

> The employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually.

Vaughn v. Westinghouse Electric Corp., supra, 620 F.2d at 659. Indeed the First Circuit in Loeb, painstakingly points out that the employer has a "burden of production" which is met by a defense designed to meet the prima facie case and which,

> must be sufficient, on its face, to 'rebut' or 'dispel' the inference of discrimination that arises from proof of the prima facie case. (emphasis added)

Loeb v. Textron, Inc., supra, 600 F.2d at 1011-1012, n.5.

> The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one.

Id. at 1012, n.6.

In each of the cases cited by petitioners in which the employer's burden of production is discussed[9/] the Court invariably discussed the proof or lack of proof presented by the employer to support the stated reason for its action.

Thus, to frame the question in terms of the requirement for "objective criteria" as petitioner attempts here, plainly misses the point of the decisions of this Court and the Circuits which have considered the issue. All that is required, and it is required by each of these decisions, is that there be come evidence that the asserted reason exists factually. Thus if the aserted reason for a discharge is that the employee abused the sick leave policy, Taylor v. Philips Industries, Inc., supra, the Court may properly expect to receive evidence as to whether other employees were similarly treated for similar abuses. See id. at 786. And if the employee was not allowed

---

9/ Kentroti v. Frontier Airlines, Inc., supra; and Patterson v. American Tobacco Co., supra, offer no discussion of this issue.

to fill a certain vacancy, James v. Newspaper Agency Corp., supra, the Court may properly expect to receive evidence that the position was never available. See id. at 583. Similarly, if the employee was disqualified Coleman v. Missouri Pac. R. Co., supra, the Court may properly expect to receive evidence regarding the comparative qualifications of those employees not disqualified. See id. at 409.

The clear import of these decisions is that neither the Eighth Circuit's opinion in Vaughn, nor the opinions of this Court require a specific type of proof in order to rebut the prima facie case.[10/] Rather, given the particular facts of a particular case a different type of proof may be appropriate.[11/]

The Eighth Circuit carefully reviewed the record in this case and determined that this

---

10/ In Furnco, for example the comparative qualifications of the employees not hired was not an issue as the defendant conceded that they were qualified.

11/ See generally, McDonnell Douglas v. Green, supra, 411 U.S at 802, n.13; Whack v. Peabody & Wind Engineering Co., supra, 595 F.2d at 193 and n.8.

Court's prescriptions with respect to the employer's burden of producing evidence once a prima facie case of employer discrimination has been established were followed by the District Court. Thus, the Eighth Circuit found that there was sufficient evidence in the record to support the District Court's view that the defendant, Westinghouse, failed to articulate a legitimate reason for Vaughn's disqualification, and, even if such a reason were found to have been articulated, the evidence, taken as a whole, was sufficient to hold the reasons to be pretextual.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG *
O. PETER SHERWOOD
CLYDE E. MURPHY
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

JOHN WALKER
1191 First National Bldg.
Little Rock, Arkansas 72201

ZIMMERY CHUTCHER, JR.
Mays, Crutcher & Brown
One Union National Plaza
Suite 836
Little Rock, Arkansas 72201

ATTORNEYS FOR RESPONDENTS

*Counsel of Record